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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 296

GROSS INCOME TAX DIVISION OF THE STATE OF INDIANA, and FRANK T. MILLIS, Director of the GROSS INCOME TAX DIVISION, STATE OF INDIANA,

Petitioner,

vs.

WARNER BROS. PICTURES DISTRIBUTING CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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Attorney General;
State of Indiana.

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MAY IT PLEASE THE COURT:

The Gross Income Tax Division of the State of Indiana, Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the opinion, decision and judgment of the Supreme Court of Indiana (by its majority opinion) entered in the above-entitled cause on March 17, 1954.

(a) Reference To Opinions Below

The majority opinion, decision and judgment of the Indiana Supreme Court (R. p. 227) and the dissenting opinion of Bobbitt, J., (R. p. 229), as yet unreported officially, are unofficially reported in 118 N. E. (2d) 117 and 119 of the West Reporter System, and are reproduced herein as "Appendix B" of this petition.

(b) Concise Statement of the Grounds on Which the Jurisdiction of this Court is Invoked

The grounds on which the jurisdiction of this Court is invoked are that the Indiana Supreme Court has decided a Federal question of substance concerning the interpretation of Article I, Section 8, Clause 3, of the United States Constitution, the Commerce Clause, not heretofore determined by this Court, in a way probably not in accord with applicable decisions of this Court and in conflict with decisions of Federal and State Courts on questions substantially indistinguishable.

(i) The date of the opinion, judgment and decree sought to be reviewed and the time of its entry is March 17, 1954. (R. p. 226) (Appendix "B").

(ii) The petition for rehearing, timely filed, was denied on May 26, 1954, without opinion. (R. p. 250) (Appendix "B").

(iii) The statutory provisions believed to confer on this Court jurisdiction to review the opinion, judgment and decree in question by Writ of Certiorari, are: Section 1257 (3) and Section 2101 (c) of Title 28 of the U. S. Code Annotated.

(c) The Questions Presented

I

Do motion picture films transmitted from out-of-state

points into the State of Indiana, for the sole purpose of their exhibition in the State of Indiana by Indiana exhibitors for specific lengths of time, remain in the flow of interstate commerce during the period that said films are being so exhibited in Indiana?

II

Does the paramount Federal regulatory power over the film distribution business under the Sherman Act, in and of itself, forbid the taxation of respondent's gross income derived from, dependent upon and proportioned to the use of its films at Indiana sites, respondent being qualified to do business in Indiana, maintaining and operating a film exchange in Indiana and transmitting the films in question from an out-of-state film exchange for purposes of convenience and economy?

III

May Indiana impose its gross income tax upon respondent's film rental income derived from the exhibition of its films by Indiana exhibitors, when respondent is qualified to do business in Indiana, maintains and operates a film exchange in Indiana, but transmits said films from without the State for purposes of convenience and economy?

(d) Constitutional Provisions and Statutes Involved

The Constitutional and statutory provisions involved are as follows: Article I, Section 8, Clause 3 of the United States Constitution, which reads as follows:

> "The Congress shall have power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *".
>
> USCA Constitution, Containing Article I, Sec. 1 to Article I, Sec. 9, p. 200.

Indiana Acts of 1937, Chapter 117, Section 2, page 611,

and found in Burns' Indiana Statutes Anno. (1951 Replacement), Volume 11, Part 2, Section 64-2602, which reads as follows:

> "Sec. 2. There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana, of all persons who are not residents of the State of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Indiana Acts of 1937, Chapter 117, Section 6(a), p. 615, and found in Burns' Indiana Statutes Anno. (1951 Replacement) (1953 P. S.) Volume 11, Part 2, Section 64-2606 (a), which reads as follows:

> "Sec. 6. There shall be excepted from the gross income taxable under this act:
>
> (a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States of America. There shall also be excepted from such gross income, salaries, pensions, and other emoluments paid by the United

States of America, and interest or other earnings paid upon bonds or other securities issued by the United States of America, but only to the extent that the State of Indiana is prohibited from imposing a tax upon such salaries, pensions, emoluments, interest, and/or earnings, by the Constitution of the United States of America."

The Gross Income Tax Act of Indiana in its entirety, as amended to date, may be found complete in Burns' Indiana Statutes Anno. (1951 Replacement) Volume 11, Part 2, Sections 64-2601 to 64-2635, both inclusive.

(e) Concise Statement of the Case Containing Facts Material to the Consideration of the Questions Presented

Respondent is a New York corporation engaged in the business of leasing and distributing motion picture films throughout the United States. (R. pp. 53, 54). In addition to its principal office, it operates said business through numerous film exchanges located in various states in cities having densely populated areas, with resulting numerous theatres in said areas and in which transportation facilities are available and abundant for distribution of said films to more remote areas. (R. pp. 55, 56).

Respondent is qualified to do business in Indiana and maintains and operates one such film exchange or branch in the City of Indianapolis, Indiana, which serves as part of its trade area all of the counties in Indiana with the exception of those bordering on the north boundary of Indiana, and two other counties in the northern part of said State. (R. p. 56). Respondent does not own or operate a motion picture theatre in Indiana. (R. p. 97).

The taxability of that part of respondent's gross receipts of its Indianapolis office, consisting of film rentals from Indiana exhibitors, is not in issue.

Respondent also operates and maintains a film exchange or branch in the City of Chicago, Illinois, which includes as a part of its trade area, all of the Indiana counties contiguous with the northern boundary of Indiana and two other counties in the northern part of Indiana. (R. p. 56). Respondent's reason for adopting this method of distribution was for its convenience and economy. (R. pp. 57, 58). Traveling representatives of the Chicago Exchange call upon Indiana exhibitors in that portion of the northern part of Indiana allocated to the Chicago office, receive applications for licenses to show certain films, which are submitted to the New York office for acceptance or rejection. Notice of acceptance or rejection is relayed through the Chicago office to the exhibitor. (R. pp. 65-67). In situations in which the application is accepted, the films contracted for are transmitted to the Chicago film exchange from which they are relayed to the Indiana exhibitor in time for showing the films on the dates specified in the contract. Except in a very few instances, when the exhibition is completed at the Indiana site, the films are returned to the Chicago office. (R. pp. 71-73). In all cases, the Indiana exhibitor assumes the cost of transportation incurred in transmitting the films from Chicago to the Indiana site and for their return to Chicago, together with all risk of damage to the films. (R. p. 94).

As consideration for the use of said films, the Indiana exhibitor pays respondent a film rental of either (1) a fixed charge, or, (2) a percentage of the box office receipts of the Indiana exhibitor derived from exhibition of the films, or, (3) a percentage of the box office receipts with a minimum fixed guaranteed rental. (R. p. 90).

The respondent reserves the right to fix minimum admission prices which the Indiana exhibitor must charge for the right to view said films, and reserves the right to check

the exhibitor's books and records, including the right to have its representatives check the sale of all tickets, and for such purpose has the right of full access to the theatre, including the box office.

Said contracts further require in the case of percentage rentals that the exhibitor shall deliver at distributor's exchange immediately after the last showing of each day, an itemized box office statement. Plaintiff's exhibits 1, 2, 3, 4. (R. pp. 78, 81, 83 and 89).

All film rental payments are received by respondent at its Chicago office (R. p. 72). It is the taxability of respondent's gross receipts, consisting of film rentals from Indiana exhibitors who are served by the Chicago branch, which is the subject-matter of this litigation.

(f) The Manner in Which the Federal Question Was Raised

The issue of alleged interstate commerce immunity was raised in the court of first instance in Superior Court, Room 3, of Marion County, Indiana, by the filing of respondent's complaint on February 18, 1947, after which respondent filed its amended complaint herein on March 24, 1948, which sought the recovery of gross income tax allegedly improperly and erroneously collected. (R. pp. 4-17).

Paragraph eight (8) of said complaint alleged as follows:

> "8. The said film rental receipts received by plaintiff's Chicago branch office from Indiana exhibitors under the facts and circumstances hereinabove alleged constitute receipts from business and transactions in interstate commerce, and the imposition of Indiana gross income tax on such receipts is an invalid and unconstitutional regulation of and burden on commerce prohibited by the commerce clause, Article I, Section 8, Clause 3, of the Constitution of the United States."
>
> (R. p. 14, ll. 3 to 10).

The issues were joined by the filing of petitioner's answer of denial on April 5, 1948. (R. pp. 18-25).

Upon the admission and conclusion of evidence and submission of the cause, the court of first instance entered, on September 18, 1952, its general finding and judgment for the respondent, reproduced herein as Appendix "A" of this petition. (R. p. 29, l. 1 to p. 30, l. 12).

The question of alleged interstate commerce immunity was pursued by the filing of petitioner's motion for new trial (R. p. 35), which was overruled by said court on January 19, 1953. (R. p. 37) (Appendix "A"). Thereafter the question of alleged interstate commerce immunity was submitted to the Indiana Supreme Court on April 17, 1953 by the filing of the Transcript of the Record, together with petitioner's Assignment of Errors. (R. pp. 1 and 2).

After briefing and argument, the Indiana Supreme Court on March 17, 1954, by a divided court, entered its written opinion, decision and judgment based solely on the question of interstate commerce immunity, which said majority opinion affirmed the judgment of the lower court. (R. p. 226). The majority and dissenting opinions are reproduced in their entirety herein as Appendix "B".

Thereafter, and within the time allowed by the rules of the Supreme Court of Indiana, the petitioner herein filed its petition for rehearing (R. pp. 247-250), which was denied by the Indiana Supreme Court on May 26, 1954, by a divided Court. (R. p. 250) (Appendix "B").

The opinion, decision and judgment of the Indiana Supreme Court was rendered by the highest Court of the State of Indiana from which a decision could be had and is a final judgment subject to no further review or correction in any other State tribunal. The issue in this case and the holding of said Court, of which review is sought by this Honorable Court, draws in question the validity of

the State statute on the grounds of being repugnant to the United States Constitution, namely, the Commerce Clause, Article I, Section 8, Clause 3.

(h) Reasons Relied Upon for the Allowance of the Writ

1. It is respectfully urged that the decision of the Indiana Supreme Court is not in accord with applicable decisions of this Court in that it holds that respondent's motion picture films do not come to rest in Indiana during their exhibition by the Indiana exhibitor.

In the case of *Independent Warehouses* v. *Scheele* (1947), 331 U. S. 70; 67 S. Ct. 1062; 91 L. ed. 1346, this Court reiterated the "coming to rest" doctrine and stated that the question whether property has "come to rest" is dependent upon the purpose of the interruption of its movement. "Not what ultimately happens to the goods or where they finally go, *but the occasion and purpose of the interruption are controlling.*" (Emphasis supplied). This Court further explained that if the interruption is merely an incident to a continuing transit dictated by necessity or convenience of the journey, that such interruption does not break the flow of commerce. However, as we understand the rule stated by said case, *if the cessation in transit is for reasons primarily concerned with the owner's business interests, then such property is deemed to have left the flow of commerce,* has become a part of the property of the state and is subject to the taxing and police power of such state.

The purpose of producing motion picture films is not for their perpetual interstate movement; no financial gain would ever result from the unending interstate transportation of films. The very purpose of producing films is for their exhibition to the public. If ever there was a case in which the interruption of the movement is for business interests, it is this case. The *constantly recurring* shipment

of film into Indiana is *solely* for the purpose of its exhibition there and would result in no income to the respondent if it were not followed by local exhibition at Indiana sites. After exhibition, the film is always returned to the Chicago film exchange, except in a few instances, even though it is scheduled for exhibition by another Indiana exhibitor in the same area and must be returned to Indiana immediately for that purpose.

Likewise, in the case of *Fox Film Corporation* v. *Trumbull* (1925), 7 Fed. (2d) 715, at p. 722, a specially constituted Federal Court distinguished the interstate movement of film into the State from its exhibition there and stated as follows:

> "Interstate commerce begins when the articles to be carried are committed to a carrier for transportation to the state of its destination or started on their ultimate passage (Coe v. Errol, 116 U. S. 517; 6 S. Ct. 475; 29 L. ed. 715) and interstate commerce ceases when the articles have arrived at their destination and are there held for final disposal or use. (Brown v. Houston, 114 U. S. 622; 5 S. Ct. 1091; 29 L. ed. 257); and it has been held that property is at its destination when it reaches a place where it is held, not in necessary delay or accommodation to the means of transportation, *but for the business purposes and profit of its owners.* It has been held then to be under the protection of the laws of the State and subject to the taxing and police power of the state. General Oil Co. v. Crain, 209 U. S. 211; 28 S. Ct. 475; 52 L. ed. 754; American Steel & Wire Co. v. Speed, 192 U. S. 500, 519; 24 S. Ct. 365; 48 L. ed. 538." (Emphasis supplied).

In the case of *United Artists Corporation* v. *Board of Censors* (1949), 189 Tenn. 397; 225 S. W. (2d) 550, Certiorari denied 339 U. S. 952; 94 L. ed. 1365; 70 S. Ct. 839, the Supreme Court of Tennessee adhered to the same theory, and stated:

> "In the light of the foregoing undisputed facts there appears no escape from the conclusion that the *United Artists has a financial interest in the outcome of every performance.* Viewing the facts as set forth in the petition we find that the film 'comes to rest' in this State when it is exhibited at a local theatre for the enrichment of appellants. It does not *come to rest* for any other purpose and constitutes 'doing business in Tennessee'. * * *. We think the weight of authority sustains the proposition that where property has reached its final destination, and held for local business purposes, the consignor and the consignee sharing in the profits of the business, it loses its interstate character and must be adjudged to be intrastate business. The taxation of such a business is not a burden upon interstate commerce." (Emphasis supplied).

In a very recent decision by the Supreme Court of Mississippi, on March 22, 1954, in the case of *Stone* v. *Stapling Machines Company,* 71 So. (2d) 205, that Court followed the same principle to uphold the taxability of rental income of a foreign corporation which rented patented box making machines in that state. On page 210 of 71 So. (2d), the Mississippi Supreme Court stated: "When the machines came to rest in this State for the purpose of manufacturing patented and unpatented boxes, the use or rent thereof became localized, and they left the stream of interstate commerce." This case is now on appeal to this Court, Docket No. 800, June 2, 1954.

We believe that the foregoing cases are indicative of the proposition that this Court, Federal Courts and State Courts recognize that when property reaches its final destination for use and is there used, that it has come to rest, thereby being subject to the taxing laws of the State, whether it be a property tax or a tax upon income derived from the use of such property. However, the Indiana Supreme Court in this case stated:

> "As we understand it, the State relies for reversal on the contention that appellee's film has reached its final destination at the exhibitor's place of business; that appellee is there engaged in a local Indiana business; that at this place the film of the appellee loses its interstate character and acquires a purely local one. With this contention we cannot agree."
>
> (118 N. E. (2d) 118) (R. p. 228).

If the Indiana Supreme Court is correct in this holding that respondent's rental income is from the use of its motion picture films in interstate commerce, *then, so too are the receipts of the Indiana exhibitor, since the pecuniary gain to each is derived from, dependent upon and in proportion to the success of exhibiting the film at the Indiana site.*

As stated in *Fox Film Corporation v. Trumbull*, 7 Fed. (2d) 715, at 725:

> "There must be some time when the films are subject to the law of the State, and necessarily when they are in the hands of the exchanges ready to be rented to exhibitors *or have passed to the latter,* they are in consumption, and mingled as much as from their nature they can be with other property of the State." (Emphasis supplied).

2. It is also urged that the Federal question decided by the Indiana Supreme Court is one of substance which has not heretofore been determined by this Court. No decision of the United States Supreme Court is cited by the majority opinion as being conclusive of the question in this case, nor is any decision of this Court cited as bearing on the questions herein. The principal case authority upon which the decision of the Indiana Supreme Court is grounded is that of *Paramount Pictures Distributing Co.* v. *Henneford* (1935), 184 Wash. 376; 51 P. (2d) 385. Certiorari denied 298 U. S. 665. This court has reiterated on numerous occa-

sions that the denial of a petition for writ of certiorari is not the equivalent of an affirmance upon the merits and "carries with it no implication whatever regarding the court's views on the merits of a case which it has declined to review."

Maryland v. Baltimore Radio Show (1950), 338 U. S. 912, pp. 917, 919; 70 S. Ct. 252; 94 L. ed. 562.

Particularly is this true in the case of Paramount Pictures Distributing Co. v. Henneford, *supra,* in view of the history of that case subsequent to its decision. It is believed that Paramount Pictures Distributing Co. v. Henneford as a case authority is of dubious conclusiveness in the light of the result of its attempted use as an authority in subsequent litigation concerning the film distribution industry. We refer particularly to the case of *United Artists Corp.* v. *James,* 23 Fed. Supp. 353 and *James* v. *United Artists Corp.,* the same case, (1939), 305 U. S. 410; 59 S. Ct. 272; 83 L. ed. 256. It is to be noted that the District Court in the James case, 23 Fed. Supp. 353, at page 358, relied upon the case of Paramount Pictures Distributing Co. v. Henneford, *supra,* in denying the right to tax a film distributor under a different type of taxing act. When the James case reached the United States Supreme Court, instead of affirming the decision of the District Court on the basis of the reasoning in Paramount Pictures Distributing Corp. v. Henneford, this Court affirmed the lower court solely for the reason that the West Virginia statute involved in that case laid the tax upon the "business of *collecting* incomes" within the State, whereas, the facts were that the incomes were not collected within that state. We believe that this court indicated that its decision in the James case was solely upon the statute involved when it stated:

> "We are not here concerned with the question whether a state by a statute appropriately framed

> may lay a tax on income derived from sources within it, or whether the solicitation of contracts may be taxed. No such taxation is attempted by Section 2 (i)."
>
> 305 U. S. 410, at p. 414.

Contrasted with the West Virginia statute, the Indiana Gross Income Tax Law does impose a tax upon income derived from sources within Indiana and it is immaterial at what point such income is received under the Indiana Act.

> *Department of Treasury v. Wood Preserving Corp.* (1941), 313 U. S. 62; 61 S. Ct. 885; 85 L. ed. 1188.

It is also worthy of note that the Federal District Court in the James case, 23 Fed. Supp. 353, at p. 358, based its decision upon the case of *Binderup v. Pathe Exchange* (1923), 263 U. S. 291; 44 S. Ct. 96; 68 L. ed. 308, but that the affirmance by this Court in 305 U. S. 410 was not grounded upon the Binderup case which involved solely the right of the Federal government to regulate the film distribution business under the Sherman Anti-Trust Act. It is believed that the authority to regulate a business under the Sherman Anti-Trust Act is not in and of itself controlling if the source of the income taxed is within the taxing state. See, for example, *Warner Bros. Pictures Inc. v. District of Columbia* (1948), 168 F. (2d) 157, 159, in which the Court stated that income received from film lease contracts was derived from District sources "because the *location* of personal property which is the subject of hire betrays the source of the owner's income derived from the hire." (Emphasis supplied). Although the Warner case, *supra*, did not involve a tax by a state, but rather by the District of Columbia, this Court has upheld the imposition of state gross receipts taxes wherein the recipient of the income was subject to Federal regulation, if the tax attaches to income apportioned to activities within the taxing state

or attributable to some local event occurring within such state.

See: *Central Greyhound Lines v. Mealey* (1948), 334 U. S. 653; 68 S. Ct. 1260; 92 L. ed. 1633;

South Carolina Power Co. v. S. Carolina Tax Comm. (1931), 52 F. (2d) 515. Affirmed per curiam 286 U. S. 525, 52 S. Ct. 494; 76 L. ed. 1268;

Utah Power and Light Co. v. Pfost (1932), 286 U. S. 165; 52 S. Ct. 548; 76 L. ed. 1038.

Since the case of Paramount Pictures Distributing Co. v. Henneford, *supra,* upon which the Indiana Supreme Court grounds its decision was, in turn, based upon the Binderup case, which was solely a Sherman Anti-Trust Act case, and in view of this Court's refusal to affirm the James v. United Artists case upon said authorities, it may well be questioned whether the decision in Paramount Pictures Distributing Co. v. Henneford, is conclusive of this question. If the power of the Federal government to regulate an industry under the Sherman Anti-Trust Act is in and of itself determinative in a tax case, the application of such rule would be easy, but the effects would be so far reaching as to be inconsistent with past decisions of this Court.

Further, unlike the Washington tax involved in Paramount Pictures Distributing Company v. Henneford, supra, the Indiana tax is not a privilege or occupation tax.

J. D. Adams Manufacturing Co. v. Storen (1938), 304 U. S. 307, 310; 58 S. Ct. 913; 82 L. ed. 1365.

3. It is further urged that the decision of the Indiana Supreme Court has determined a Federal question of substance in a way not in accord with applicable decisions of this Court, in that it holds that respondent, qualified to do business in Indiana, maintaining and operating a film exchange in Indiana for the purpose of leasing and distribut-

ing its motion picture films, and thereby enjoying the full privileges, benefits and protection of Indiana law, is not subject to tax on its entire income from leasing its films in Indiana, solely because a portion of such business and income is facilitated from an out-of-state branch, for no other purpose than its convenience and economy.

The reason for respondent serving the northern tier of Indiana counties from its Chicago film exchange was explained by Robert A. McGuire, Auditor of Exchanges, who testified as follows:

> "Q. Will you tell us what are the facts with respect to the allotment of the tier of northern Indiana counties to the Chicago Film Exchange for service by that Exchange? What are the reasons that that is done and how does that affect the operation of your business handled out of that Chicago Film Exchange?
>
> "A. The greater part, if not all, of the northern tier of counties in Indiana is closer to the City of Chicago than to Indianapolis and the transportation facilities are better. In addition to that, a considerable portion of that part of Indiana, the accounts, the theatres in that portion are subject to clearance of the City of Chicago, and they could not readily be booked with pictures from Indianapolis.
>
> "Q. Would there be any loss of time and inefficiency and additional expense resulting if those theatres or exhibitors in the northern tier of Indiana counties were served by the Indianapolis Film Exchange?
>
> • • •
>
> "A. There would be, because by serving those accounts from the City of Chicago, we can expedite the delivery and return of the film because of the greater transportation facilities. That is a

> big item of print expense in our cost of operation."
>
> (R. pp. 57, 58).

It is also known, although not contained in the Record, that this practice is one generally followed by the entire film distribution industry, and is practiced by at least eight other film distribution companies.

A case concerning the application of the Indiana Gross Income Tax Law to facts substantially indistinguishable from those herein, which was affirmed by this Court per curiam, is that of *Department of Treasury v. Allied Mills, Inc.* (1942), 220 Ind. 340; 42 N. E. (2d) 34, affirmed per curiam 318 U. S. 740; 63 S. Ct. 666; 87 L. ed. 1120. Not only was the decision of the Indiana Supreme Court in that case affirmed per curiam by this Court, but it was approved and explained by this Court in *International Harvester Co. v. Department of Treasury* (1944), 322 U. S. 340, at 346, in the following language:

> "In that case an Indiana corporation had one factory in Indiana and two in Illinois. Each factory was given a specified part of Indiana to service—a method of distribution adopted to take advantage of favorable freight rates, not to evade taxes. The issue in the case was whether the Indiana Gross Income Tax could be applied to receipts from sales to resident customers in Indiana to whom deliveries were made from plants in Illinois pursuant to orders taken in Indiana and accepted in Illinois. The Indiana Supreme Court sustained the imposition of the tax. We affirmed that judgment on the authority of *Felt and Tarrant Co. v. Gallagher* 306 U. S. 62 and *McGoldrick v. Felt and Tarrant Co.*, 309 U. S. 70."
>
> 322 U. S. 340; 64 S. Ct. 1019; 88 L. ed. 1313.

It is believed that the only point of distinguishment between the facts herein and those in the Allied Mills case,

supra, is that Allied Mills, Inc. was an Indiana corporation, whereas, Warner Bros. Pictures Distributing Corp. is a foreign corporation, qualified to do business in Indiana and maintaining and operating a film exchange in Indiana. Its qualification in Indiana is, for practical purposes, to place it upon an equal basis with Indiana corporations so that, in our opinion, this point of distinction is not substantial. If anything, the facts in the instant case would appear to be stronger in support of taxability of respondent's income than in the case of Allied Mills, for here the income consists of *film rental for use of respondent's property in Indiana* by the same Indiana exhibitors over and over again, *thereby establishing a pattern of a continuing business with the same customers substantially indistinguishable from the business of its Indianapolis film exchange.* By contrast the income in Allied Mills was derived from sales rather than use of property. The effect of the decision of the Indiana Supreme Court herein is to obliterate the permanent boundaries of Indiana for the purpose of determining source of income and to substitute therefor uncertain, ever changing boundary lines to meet the dictates of the convenience of each individual business.

The case herein, we repeat, is stronger for taxability because the income was rent from the *use* of property and, as stated by the Court in Warner Bros. Pictures, Inc. v. District of Columbia, the source of rental income is betrayed by the *location* of the personal property which is the subject of hire.

CONCLUSION

WHEREFORE, your petitioner respectfully prays that this Petition for Writ of Certiorari be granted, that a review of the case herein be made by this Honorable Court, and that the majority opinion, decision and judgment of the Indiana Supreme Court be in all things reversed and for such other relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

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APPENDIX "A"

Entry of Finding and Judgment, Finding and Judgment, and Entry of Overruling of Petitioner's Motion for New Trial by the Trial Court

"And afterwards towit September 18th, 1952, being the 16th Judicial day of the September Term 1952 of said Court, before the Honorable William R. Higgins Special Judge thereof the following further proceedings were had herein towit:

Judgment

Come now the parties, Warner Bros. Pictures Distributing Corporation, plaintiff, and Gross Income Tax Division of the State of Indiana, defendant, by their respective attorneys of record herein, and this cause, being at issue on plaintiff's complaint and the answer thereto of the defendant and having heretofore by agreement of the parties been submitted to the Court for trial, finding and decree, without the intervention of a jury, was duly tried by the Court and was taken under advisement by the Court.

And the Court having considered the pleadings and the evidence adduced at the trial, and having read and considered the briefs of counsel for the parties, and being sufficiently advised in the premises, now finds for the plaintiff, that the law is with the plaintiff and against the defendant, and that plaintiff is entitled to recover from the defendant the amount of Indiana gross income tax, and interest thereon, paid by plaintiff to the defendant, on the film licensing receipts received by plaintiff's Chicago film exchange from Indiana exhibitors described in plaintiff's complaint, in the total sum of $7,347.94, with interest thereon at the rate of 3% per annum from January 16, 1946, until paid;

Now, therefore, it is ORDERED, ADJUDGED AND DECREED THAT PLAINTIFF, Warner Bros. Pictures Distributing Corporation have and recover of and from the defendant herein, Gross Income Tax Division of the State of Indiana, the sum of Seven Thousand Three Hundred Forty-seven Dollars and Ninety-four Cents ($7,347.94), and interest thereon at the rate of three percent (3%) per annum from January 16, 1946, until the aforesaid amount of this judgment is fully paid.

And it is further ORDERED, ADJUDGED AND DECREED that defendant pay the costs of this action.

Entered this 18th day of September, 1952.

/s/ William R. Higgins
William R. Higgins, Special Judge."

(R. p. 29, l. 1 to p. 30, l. 12).

Entry of Overruling of Petitioner's Motion for new Trial

"And afterwards towit January 19th 1953 being the 13th Judicial day of the January Term 1953 of said Court, before the Honorable William R. Higgins, Special Judge thereof the following further proceedings were had herein towit:

"Come now the parties by counsel and the Court being duly advised in the premises now overrules defendants motion for a new trial."

(R. p. 37, ll. 1 to 7)

APPENDIX "B"

Entry of Decision and Opinion of Indiana Supreme Court, Majority and Dissenting Opinions, 118 N. E. (2d) 117 and 119, Respectively, and Denial of Petitioner's Petition for Rehearing.

"And afterwards, to-wit: On the 17th day of March, 1954, the same being the 99th judicial day of the November Term, 1954 of said Supreme Court of the State of Indiana, the following proceedings were had in said appeal.

"Comes now the parties by counsel and the court being advised in the premises affirms the judgment of the lower court in an opinion pronounced by Flanagan, J., which opinion is in the words and figures following, to-wit:

CAPTION

FILED
MAR. 17, 1954
Thomas C. Williams, Clerk.

From the Marion Superior Court, Room No. 3, William R. Higgins, Special Judge."

"FLANAGAN, J.

The question presented is whether appellee is engaged in interstate commerce. If so engaged, and the tax sought to be imposed is a direct burden upon that commerce, its receipts are not subject to the Indiana Gross Income Tax.

Appellee is a New York corporation licensed to do business in the State of Indiana. It maintains branch offices, called film exchanges, in the principal cities throughout the country, for the purpose of distributing its motion picture films to exhibitors who sign license agreements with the corporation. One such office is located in Indianapolis and serves those licensees of the appellee in the central and

southern counties of Indiana. Another such office is located in Chicago and serves licensees in Illinois, part of Iowa, and the northern counties of Indiana. The right of the State to impose a tax on the gross receipts of the Indianapolis office is not here in issue. It is tax on the gross receipts from Indiana licensees of the Chicago office with which we are concerned.

The business of the Chicago office is carried on by traveling salesmen who call upon the Indiana exhibitors and receive from them applications for licenses to show certain films. These salesmen submit the applications to their Chicago office, which, in turn, forwards them to the New York office of appellee for acceptance or rejection. Notification of acceptance or rejection is sent to the Chicago office and from there relayed to the exhibitor. In cases of acceptance the film contracted for is shipped to the Chicago office and then to the exhibitor. The exhibitor, after showing the film, in most cases, sends it back to the Chicago office. In all cases the exhibitor assumes the cost of the transportation as well as the risk of damage to the film in transit. All payments under the license agreements are received by the appellee at its Chicago office.

As we understand it, the State relies for reversal on the contention that appellee's film has reached its final destination at the exhibitor's place of business; that appellee is there engaged in a local Indiana business; that at this place the film of the appellee loses its interstate character and acquires a purely local one. With this contention we cannot agree.

In the case of *Paramount Pictures Dist. Co. v. Henneford* (1935), 184 Wash. 376, 51 P. (2d) 385, it was held, under circumstances more favorable to appellant than in the instant case, that similar transactions in the rental of films do constitute interstate commerce. See, also, *State v. Para-*

mount Publix Corporation (1934), 178 La. 818, 152 So. 534.

In the case of *Gross Income Tax Division v. Surface Combustion Corp.* (1953), — Ind. —, 111 N. E. (2d) 50, 66, this court said:

> "The United States Supreme Court has consistently held that a tax on gross income from transactions in interstate commerce is an unconstitutional burden upon, or interference with, commerce among the states."

We cannot see that appellee in the instant case, by reserving to itself the right of visitation on the exhibitor for purposes of determining its rightful license fee, has thus become engaged in the local exhibition of the film which it has licensed to the exhibitor. Nor can we see that the license agreement, providing for a percentage of the exhibitor's admission price as the license fee, changes the character of the transaction.

Judgment affirmed.

Draper, C. J. and Emmert and Gilkison, J. J. concur.

Bobbitt, J., dissents with the following opinion."

(R. pp. 226-229)

CAPTION

FILED
MAR. 17, 1954
Thomas C. Williams, Clerk

DISSENTING OPINION

"BOBBITT, Judge.

I cannot agree with the majority opinion for the following reasons:

First: Appellee is duly qualified to do business in Indiana

and maintains a place of business designated as a film exchange in the city of Indianapolis. During the years here in question appellee, a New York corporation with its executive offices and principal place of business in the city of New York, was engaged in the business of licensing exhibitions of motion picture films under written agreements with motion picture exhibitors in Indiana. Branch offices designated as film exchanges are maintained in various trade areas for the purpose of serving the exhibitors in that territory. Appellee maintains such a branch office—film exchange—in the city of Indianapolis from which it serves theatre exhibitors in all of Indiana except certain counties in the extreme northern part of the state. Appellee also maintains a film exchange in the city of Chicago which serves that trade area, the northern half of Illinois, certain parts of Iowa, Wisconsin, Michigan and certain counties in northern Indiana which are not served by the Indianapolis branch office—exchange.

No question is here presented as to tax assessed and paid upon the receipts from the business conducted through and from the Indianapolis exchange.

From the facts as presented by the record it conclusively appears that appellee has subjected itself to local jurisdiction and is engaged in a local business or activity consisting of leasing and distributing motion picture films for exhibition in Indiana; controlling and regulating the time and manner of their exhibition; and the rendering of service in connection therewith. Appellee's activities in that part of Indiana which is served by the Chicago exchange are essentially and in fact no different from those conducted from its Indianapolis exchange and are, therefore, in fact, an integral part of appellee's Indiana business.

I do not concur in appellant's contention that the provision of the lease which retained to appellee the right to fix

the provision for auditing exhibitor's books has the legal effect of making appellee a participant in the local enterprise of exhibiting films in theatres in Indiana. Nor do I believe the provision for film rental based upon a percentage of the gross receipts has such an effect. This provision in the lease is only the measuring stick for determining the rental fee to be charged. However, we are here concerned with the source of appellee's income derived from its lease contracts with Indiana exhibitors, and the fact that appellee may not be engaged in a joint enterprise with its exhibitors in a local exhibition of motion picture film in Indiana does not, under the circumstances in this case, determine the source of its income.

It seems clear to me that appellee's income here in question is derived from the leasing or rental and distribution of moving picture films to local exhibitors for exhibition in their theatres and from services and functions rendered and connected therewith, and not from the actual exhibition of the films.

The cases of *Tad Screen Advertising v. Oklahoma Tax Comm'n.* (CCA 10th, 1942), 126 F. (2d) 544, and *Ligon v. Alexander Film Co.* (1932), Tex. Com. App. 55 S. W. (2d) 1030, (certiorari denied 289 U. S. 760, 53 S. Ct. 793, 77 L. ed. 1503, are clearly distinguishable from the case at bar and lend no support to appellant's position. In those cases no leasing of films to the local exhibitors was involved but the advertising films shown were, under the distributor's contract, exhibited by it, the local exhibitor being paid a fee for the use of his theatre in showing the film. That is not the situation in this case.

Second: The majority opinion is grounded upon *Paramount Pictures Distributing Co. v. Henneford* (1935), 184 Wash. 376, 51 P. (2d) 385, which case was decided upon the authority of *Binderup v. Pathe Exchange* (1923), 263 U. S.

291, 44 S. Ct. 96, 68 L. ed. 308. The latter case involved a violation of the Sherman Act. In that case the film contracts were between residents of different states, and the activities were between residents of different states. The activities consisted of manufacturing the films in one state, finding customers for them in others, making contracts of lease with them and transporting the film leased from the state of manufacture into the state of the lessees. In some instances the films were consigned to a local agency of the distributor to be by that agency held until delivery to the lessee in the same state. At page 317, 68 L. ed., it is said:

> "The contracts with these distributors contemplated and provided for transactions in interstate commerce. The business which was done under them —leasing, transportation, and delivery of films—was interstate commerce."

That the shipment of motion picture films by a producer or manufacturer from one state to exhibitors in another state to be exhibited by the latter is a transaction in interstate commerce is well settled.

Tad Screen Advertising v. Oklahoma Tax Com'n. (CAA 10th, 1942), 126 F. (2d) 544, 548, *supra;*

Fox Film Corporation v. Trumbull (1925), D. C. 7 F. (2d) 715, 721;

Fox Film Corporation v. Federal Trade Commission (1924), 2d Cir., 296 Fed. 353;

Binderup v. Pathe Exchange (1923), 263 U. S. 291, 44 S. Ct. 96, 68 L. ed. 308, *supra.*

No question concerning the power to tax the receipts derived from the contracts involved was present in the Binderup case. It concerned only the question whether the transactions there present were in interstate commerce so as to bring them within the provisions of the Sherman Act. While

this case is authority upon the question of the interstate nature of the shipment of motion picture films across state lines, it lends no support to the determination of the validity of the tax here in question—it does not establish the source of appellee's income under the facts in the case at bar. It does not follow that because a transaction is one in interstate commerce, and thereby comes within the terms of the Anti-trust Act, that it is, therefore, immune from state taxation.

The tax involved in the Henneford case was an excise tax for the privilege of engaging in business in the state of Washington. The tax with which we are here concerned is one upon gross receipts from commerce.[1] If appellee's income is wholly from transactions in interstate commerce, then the Henneford case might be persuasive in the case at bar, but if appellee's income is from intrastate business, or activities within Indiana, the Henneford case does not apply.

Appellee relies upon the ruling of this court in connection with Class A sales in *Dept. of Treasury v. International Harvester Co.* (1943), 221 Ind. 416, 47 N. E. (2d) 150, in support of its position that the film rental receipts from Indiana exhibitors received by its Chicago film exchange are derived from sources outside the state of Indiana-transactions in interstate commerce.

In the Harvester case the sale was completed outside the state of Indiana and the income sought to be taxed was from this sale. All that remained to be done in that situation was the shipment of the article to the purchaser in Indiana where the article was consumed by use. While in the case at bar only the *right to use* was sold outside Indiana. In the

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[1] See: J. D. Adams Mfg. Co. v. Storen (1938) 304 U. S. 307, 58 S. Ct. 913, 82 L. ed. 1365, 117 A. L. R. 429; Sec. 64-2601, Burns' 1951 Repl. Acts 1933, ch. 50, Sec. 1, p. 388 and amendments thereto.

case of percentage films appellee received no income from the sale of such right until it was exercised by the exhibition of the film in Indiana by the lessee—exhibitor, under the conditions and regulations imposed by lessor-appellee. Since, with rare exceptions, there is no income to appellee except as liquidated damages unless the film is delivered and used, it cannot be said that appellee's income is from the mere sale of the right to use the film. It must be conceded that the delivery of the film as well as the performance of certain other things, within the control and dependent upon appellee, must transpire in Indiana before there is income to appellee.

The income sought to be taxed in the Harvester case did not depend upon the use of the article in Indiana or any other activity within the state. This, it seems to me, clearly distinguishes the Harvester case from the one at bar.

Third: The error of the majority opinion lies in the application of the rule as quoted from *Gross Income Tax Division v. Surface Combustion Corp.* (1953), 232 Ind. 100, 111 N. E. (2d) 50, 66.

While it is well settled that the shipping of motion picture film from one state to exhibitors in another state for exhibition by the latter is interstate commerce, it is likewise well settled that when an article that has been shipped in interstate commerce has arrived at its destination and is there held for use and disposal, it passes under the protection of state law and becomes subject to the taxing and police power of the state.

Gross Income Tax Div. v. J. L. Cox and Son (1949), 227 Ind. 468, 86 N. E. (2d) 693, 10 A. L. R. (2d) 642;

Tad Screen Advertising v. Oklahoma Tax Com'n. (CAA 10th, 1942), 126 F. (2d) 544, 548, *supra,* and cases there cited.

The shipment of film by appellee from its Chicago exchange to exhibitors in Indiana is an interstate transaction, but there are here present other factors which the majority opinion fails to consider. These, in my opinion, determine the outcome of this appeal.

Appellee serves its lessees in by far the greater number of counties in Indiana from its Indianapolis exchange. Its activities there are similar to those carried on by other exchanges throughout the entire territory which appellee serves. The activities at the Indianapolis branch consist of the furnishing of motion picture films for exhibition in local theatres in Indiana, the furnishing of advertising in connection therewith, at the cost of exhibitor, the regulation of the time and manner of each exhibition and the rendering of such services in connection with the distribution of its films as are necessary and essential thereto. In my opinion this is a local activity carried on within the state of Indiana by appellee through the use of personal property which has arrived at the destination where it is to be used, and the income derived from such activities is within the taxing power of the state of Indiana. The taxing of the gross receipts derived from such activities in Indiana, which are directed from its Chicago exchange, is not a burden on the interstate transaction which is incidentally involved in and connected therewith.

Holland Furnace Co. v. Department of Treasury (1943), 7 Cir., 133 F. (2d) 212, certiorari denied 320 U. S. 746, 64 S. Ct. 49, 88 L. ed. 443.

A tax on such receipts does not discriminate against appellee in favor of other distributors, local or foreign.

The leasing and distributing of films and the rendering of services incidental thereto from appellee's Indianapolis exchange, in my opinion, constitutes doing business or engaging in activities within Indiana, as appellee has prop-

erly qualified so to do. The business or activity carried on in the counties which are served by the Chicago exchange is of an identical nature to that which is carried on in the counties that are served by the Indianapolis exchange.

It therefore seems to me that if the receipts from the Indianapolis branch are taxable and the tax is not a burden upon, or an undue interference with, the interstate shipment of films from without Indiana to the Indianapolis exchange, the receipts from similar activities conducted in Indiana from the Chicago exchange would likewise be taxable, and such tax would not be a burden upon the interstate incident of transferring the film from Chicago to the exhibitors in Northern Indiana.

The imposition of the tax on the receipts from that part of Indiana served by the Chicago exchange is no more of a burden upon the interstate shipment of films across state lines than is the imposition of the tax on those receipts in the Indianapolis exchange which are derived from the remaining counties in Indiana.

Fourth: Section 2 of the Gross Income Tax Act (Acts 1937, ch. 117, Sec. 2, p. 604, being Sec. 64-2602, Burns' 1951 Replacement) provides:

> "There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the state of Indiana, of all persons who are not residents of the state of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to

particular privileges, occupations, and/or activities."

This brings us then to the question—Is appellee's income which is here sought to be taxed derived from transactions in interstate commerce or from "activities or businesses or any other source within the State of Indiana?"

The fact that appellee and the exhibitor may not be jointly engaged in a local business enterprise does not change the source of appellee's income. Under the lease contract appellee has no income except as liquidated damages,[2] unless the films are distributed to the local exhibitors and shown—used—in the local theatre by the exhibitor in the manner and at the time prescribed by appellee.

Source is that from which anything comes forth. Webster's New International Dictionary, 2 ed. We are here concerned with the source of gross income as defined in the act.[3]

The deliveries of film from the Chicago branch are as much a part of its Indiana business as are those made from its Indianapolis distributing station. Appellee cannot escape a part of the burden which it assumes for the privilege of doing business in Indiana by servicing, because of convenience and better transportation facilities, a part of its Indiana territory from a film exchange located in the City of Chicago, Illinois. We may properly assume that these transactions are not unrelated to appellee's other business in Indiana, and it cannot be considered an unequal burden for this state to require that part of appellee's business to

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[2] Clause 3 of the contract provides for liquidated damages to the exhibitor in case appellee fails to furnish a film, and appellee in the event exhibitor fails, for reasons within his control, to show a film.

[3] Section 64-2601, Burns' 1951 Repl., Acts 1933, ch. 50, Sec. 1, p. 388, and amendments thereto.

bear its share of the price of enjoying the full benefits accruing from its Indiana business.

See: *Nelson v. Sears, Roebuck & Co.* (1941), 312 U. S. 359, 61 S. Ct. 586, 85 L. ed. 888, 892, 132 A. L. R. 475.

Robert A. McGuire, auditor of exchanges for appellee, testified, by deposition, as to the reasons for servicing the northern Indiana counties from the Chicago exchange, as follows:

"Q. Will you tell us what are the facts with respect to the allotment of the tier of northern Indiana counties to the Chicago Film Exchange for service by that exchange? What are the reasons that that is done and how does that affect the operation of your business handled out of that Chicago Film Exchange?

"A. The greater part, if not all, of the northern tier of counties in Indiana is closer to the City of Chicago than to Indianapolis and the transportation facilities are better. In addition to that, a considerable portion of that part of Indiana, the accounts, the theatres in that portion are subject to clearance of the City of Chicago, and they could not readily be booked with pictures from Indianapolis.

"Q. Would there be any loss of time and inefficiency and additional expense resulting if those theatres or exhibitors in the northern tier of Indiana counties were served by the Indianapolis Film Exchange?

"A. There would be, because by serving those accounts from the City of Chicago, we can expedite the delivery and return of the film because of the greater transportation facilities. That is a big item of print expense in our cost of operation."

In *Warner Bros. Pictures, Inc. v. District of Columbia* (1948), 83 U. S. App. D. C. 158, 168 F. (2d) 157, the District of Columbia Circuit Court, in determining whether income was from a source within the District of Columbia, where the activities which gave rise to the income were similar to those carried on by appellee in the case at bar from its Chicago exchange, at page 159, said:

> "Under the conception of the contract as establishing a joint adventure, the two adventures used the positive prints in the District of Columbia by hiring them to theatres therein. If the contract was a lease of the prints from Warner to Distributor for subletting to theatres, then Warner used the prints in the District of Columbia by leasing them to Distributor therein. Whether joint adventure or lease, the sums received by Warner came from District sources because the location of personal property which is the subject of hire betrays the source of the owner's income derived from the hire.
>
> "But we need not decide whether under the contract there was a joint adventure, a simple lease or some other relation; the simple fact, which cannot be avoided by any technicalities of construction, is that Warner's photoplays were hired to District exhibitors and Warner received a percentage of the money paid by them. Legal niceties cannot destroy the actuality that such money was income from sources within the District."

Fox Film Corporation v. Trumbull (1925), D. C. 7 F. (2d) 715, *supra,* involved a tax levied by the State of Connecticut upon motion picture films which were shipped into Connecticut from Boston, Massachusetts under lease contracts similar to those with which we are concerned in the case at bar.

In the Trumbull case, the District Court held that the business in which appellants were engaged was clearly interstate commerce, but that under the facts,

which are indistinguishable from those in the case at bar, the films came to rest within the State of Connecticut and were subject to the law of that state. At page 725 of 7 F. (2d), it is said:

> "There must be some time when the films are subject to the law of the state, and necessarily when they are in the hands of the exchanges ready to be rented to exhibitors or have passed to the latter, they are in consumption, and mingled as much as from their nature they can be with other property of the state."

Ford Motor Co. v. Department of Treasury (1944), 7th Cir., 141 F. (2d) 24, involved the assessment of gross income derived from the sale of cars, trucks and parts which were shipped directly from appellant's factory in Michigan, or from assembly plants in Illinois, Ohio, and Kentucky to dealers in Indiana, where such products were paid for by the Indiana dealers in cash upon the delivery thereof to the employees of the truck-away or convoy companies which delivered the products, which payments were by such employees taken and delivered in due course to the respective branches of appellant from which the products had been shipped.

While this case involved a tax on the sale of automobiles, trucks or parts which were shipped from points outside Indiana to dealers within the state, and while the judgment was vacated on appeal to the United States Supreme Court on another question,[4] the reasoning in that case applies with equal force to the facts in the case at bar.

The Circuit Court there held that the gross income involved in the Ford Motor case was derived from sales in which all transactions, except the placing of orders and the

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[4] *Ford Motor Co. v. Department of Treasury* (1945), 323 U. S. 459, 65 S. Ct. 347, 89 L. Ed. 389.

shipment of goods, took place in Indiana. The only apparent distinction between that situation and that of a shipment by appellee of films from Chicago to exhibitors in northern Indiana, is that in the case at bar the rental fee is forwarded by the exhibitor directly to the Chicago exchange, while in the Ford Motor case the payment for the products delivered was delivered to the proper branch (point of distribution) by the agent of the carrier which delivered the products. In one case the payment was sent by mail, and in the other by messenger.

Also, in the Ford Motor case, as here, the sales involved were only a part of appellant's Indiana business.

In holding that the sale there involved took place in Indiana and the fact that it arrived in this state in interstate commerce was not material, the court, at page 26, 141 F. (2d) said:

> "Since the gross income here involved was derived from sales in which all transactions except the placing of some orders and the shipment of the goods took place in Indiana, the sales occurred in Indiana and such transactions were so isolated in and identified with Indiana that the possibility of multiple taxation of such sales was eliminated. That being so, the fact that the merchandise arrived in Indiana in interstate commerce is immaterial. *Department of Treasury v. Allied Mills,* 220 Ind. 340, 42 N. E. (2d) 34; *J. D. Adams Manufacturing Co. v. Storen, supra; Department of Treasury of Indiana v. Wood Preserving Corp.,* 313 U. S. 62, 61 S. Ct. 885, 85 L. ed. 1188; *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U. S. 33, 57, 60 S. Ct. 388, 84 L. ed. 565, 128 A. L. R. 876.
>
> "It is not controlling that the gross income taxed is derived from the sale of goods that arrive in the State in interstate commerce. If the tax does not burden interstate commerce, it is not invalid, and it does not burden interstate commerce when the gross

receipts are derived from sales that took place within the taxing state. That is this case."

While the case of *United Artists Corporation v. Board of Censors* (1949), 189 Tenn. 397, 225 S. W. (2d) 550 involved the validity of certain acts creating a board of censorship in the City of Memphis and county of Shelby, Tennessee, I believe the holding of the Tennessee Supreme Court in that case on the question of whether appellant was doing business in the state of Tennessee is persuasive in the case at bar. At page 555, 225 S. W. (2d), it is said:

> "In the light of the foregoing undisputed facts there appears no escape from the conclusion that the United Artists has a financial interest in the outcome of every performance. Viewing the facts as set forth in the petition we find that the film *'comes to rest'* in this state when it is exhibited at a local theatre for the enrichment of appellants. It does not *come to rest* for any other purpose and constitutes 'doing business' in Tennessee."

And further, at page 555:

> "We think the weight of authority sustains the proposition that where property has reached its final destinaton, and held for local business purposes, the consignor and the consignee sharing in the profits of the business, it loses its interstate character and must be adjudged to be intrastate business. The taxation of such a business is not a burden upon interstate commerce. *General Oil Co. v. Crain*, 209 U. S. 211, 28 S. Ct. 475, 52 L. ed. 754; *Browning v. City of Waycross*, 233 U. S. 16, 34 S. Ct. 578; 58 L. ed. 828; *Fox Film Corporation v. Trumbull*, D. C., 7 F. (2d) 715, 722."

The law looks at the substance and not to the form. *Browning v. City of Waycross* (1914), 233 U. S. 16, 34 S. Ct. 578, 58 L. ed. 828;

Commissioner of Internal Revenue v. Court Holding Co. (1945), 324 U. S. 331; 65 S. Ct. 707; 89 L. ed. 981;

Ingram-Richardson Mfg. Co. v. Gross Income Tax Div. (1954), Ind. Sup. 117 N. E. (2d) 272.

When the transactions, the receipts from which are here sought to be taxed, are stripped of formalities and the substance of plaintiff's-appellee's activities carried on from its Chicago exchange is considered in connection with and as a part of the total business and activities in which it is engaged in Indiana, it must be concluded that appellee's income from lease contracts with exhibitors in those counties served by the Chicago branch, because of convenience, is an integral part of the whole of its Indiana business.

When appellee conducts business and carries on activities within the state of Indiana under a license from the state, it is entitled to and enjoys all of the benefits which accrue to and flow from such right. It cannot escape the burdens which are imposed by reason of the privileges granted, by the subterfuge of conducting a part of such business from a branch office across the state line, because it is more convenient and economical so to do, by asserting that those activities which are carried on from such branch are transactions in interstate commerce and, as such, are not subject to the same burdens as is the remainder of its business and activities which are similarly conducted from a branch located within the state. Neither can it escape that burden by having the proceeds of its intrastate activities paid to it in another state.

Department of Treasury v. Wood Preserving Corp. (1941), 313 U. S. 62, 61 S. Ct. 885, 85 L. ed. 1188;

Gross Income Tax Division v. J. L. Cox and Son (1949), 227 Ind. 468, 86 N. E. (2d) 693; 10 A. L. R. (2d) 642, *supra.*

Office - Supreme Court, U. S.
FILED
SEP 16 1954
HAROLD B. WILLEY, Clerk

Supreme Court Of The United States

OCTOBER TERM, 1954

NO. 296

GROSS INCOME TAX DIVISION OF THE STATE OF INDIANA, and FRANK T. MILLIS, Director of the GROSS INCOME TAX DIVISION, STATE OF INDIANA,
Petitioner,
vs.
WARNER BROS. PICTURES DISTRIBUTING CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court Of The United States

OCTOBER TERM, 1954

NO. 296

GROSS INCOME TAX DIVISION OF THE STATE OF INDIANA, and FRANK T. MILLIS, Director of the GROSS INCOME TAX DIVISION, STATE OF INDIANA,
Petitioner,

vs.

WARNER BROS. PICTURES DISTRIBUTING CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

The petition herein adequately sets forth the opinions below (118 N.E. 2d 117), the grounds on which the jurisdiction of this Court is invoked, the constitutional provisions and statutes involved and the manner in which the federal question was raised below. Inaccuracies in petitioner's statement of the question presented and the facts of the case are herein pointed out and corrected.

The Question Presented

The decision of the court below presents the single question:

Does the commerce clause of the Federal Constitution preclude the imposition of the Indiana gross receipts tax on

the receipts of the Chicago film exchange of respondent, a New York corporation, from the interstate licensing of copyrighted motion picture films for exhibition in Indiana?

Correction of Petitioner's Statement of the Case

Contrary to the implications in the petition (p. 5, last three lines), the licensing of film to Indiana exhibitors located in the *Chicago* trade area by respondent's Chicago film exchange is wholly separate and distinct from the business carried on by respondent's Indianapolis exchange in licensing film to exhibitors in the *Indianapolis* area. (R. 96-97.) The simple fact is that the licensing and distribution of motion pictures is through business necessity carried on by regional trade area divisions in virtually the same manner in which the wholesale trade of the country is conducted.

Exhibitors in the northern counties of Indiana are served by the Chicago film exchange because such exhibitors and the communities served by them are closer to the City of Chicago than to Indianapolis, because the transportation facilities from Chicago serving northern Indiana permit more expeditious delivery and return of films and because the "clearance" of pictures (preferential scheduling of pictures in classified theaters and communities) is closely related to the scheduled exhibition of films in the Chicago metropolitan area. (R. 57-58.)

The use of respondent's film in Indiana is subjected to the Indiana gross receipts tax as imposed on the *exhibitor's* admission charges under petitioner's Regulation 1824, the material part of which reads:

> "Regulation 1824. Theatres. Theatres and motion picture houses are taxable on their entire gross

receipts without deductions for commissions, house or film rentals or other expenses incident to exhibitions. . . ." (Indiana Gross Income Tax Regulations 46, Series VII, Regulation 1824; Commerce Clearing House Indiana Tax Service P. 10-408c.)

Under the license agreements the licensee's liability for the licensing charges is not conditioned on the exhibition of the licensed film. The licensee is relieved from such liability only if the exhibition of the film is prevented by causes beyond the licensee's control. (Exhibition contract, Exhibit 1, R. 78.)

ARGUMENT

The question presented was decided by the Indiana Supreme Court wholly in accord with the applicable decisions of this Court. For that and other sound reasons, review by this Court of the decision below is needless and inappropriate.

Prior Adjudications

Respondent's business of licensing the exhibition of motion pictures and distributing positive films carried on across state lines has been repeatedly held to constitute interstate commerce.

Binderup v. Pathe Exchange (1923), 263 U. S. 291 (antitrust law violation);

U. S. v. First National Pictures (1929), 34 F. 2d 815 (antitrust law violation);

U. S. v. Paramount Famous Lasky Corporation (1929), 34 F. 2d 984 (antitrust law violation);

James v. United Artists (1939), 23 F. Supp. 353, affirmed on other grounds, 305 U.S. 410 (state tax on gross receipts);

Paramount Pictures Distributing Co. v. Henneford (1935), 184 Wash. 376, 51 P. 2d 385; certiorari denied 298 U.S. 665 (state tax on gross receipts);
State v. Paramount Publix Corporation (1934), 178 La. 818, 152 So. 534 (state tax on gross receipts).

The imposition of a state gross receipts tax on the receipts from such interstate business has been held violative of the commerce clause of the United States Constitution.

Paramount Pictures Distributing Co. v. Henneford, supra;
State v. Paramount Publix Corporation, supra;
James v. United Artists, supra.

The *Paramount Pictures* case in the Washington state court was a test case brought by the film distributors operating in that state and has been relied on by both the states and the film distributors as a final adjudication of the question.

This Court's opinion in *James v. United Artists, supra,* does not detract from the District Court decision in that case, as petitioner contends. In construing the state statute in that case as not imposing a tax on interstate film licensing receipts, this Court merely stated that it was not there "concerned with the question whether a state, by a statute appropriately framed, may lay a tax on income derived from sources within it." (305 U. S. 414). By that statement the Court referred to a tax on income, not to a tax on gross receipts. The imposition of a tax on the (net) income from interstate business has been consistently upheld since the Court's decision in *Shaffer v. Carter* (1920), 252 U. S. 37. A state tax on unapportioned gross receipts from interstate business has been almost as consistently condemned by this Court, particularly the Indiana gross receipts tax.

J. D. Adams Mfg. Co. v. Storen (1938), 304 U. S. 307;
Freeman v. Hewit (1946), 329 U. S. 249;
McLeod v. J. E. Dilworth Co. (1944), 322 U. S. 327.

Respondent's Business Constitutes the Sale of Literary Property in Interstate Commerce, Upon Which Indiana May Not Impose a Gross Receipts Tax

In the licensing of the exhibition of copyrighted film, respondent is engaged in the sale of the copyrighted literary property in the film. In the established commercial practice the sale of copyrighted property commonly takes the form of licensing agreements. See *Commissioner of Internal Revenue v. Wodehouse* (1949), 337 U. S. 369 (particularly, dissenting opinion, J. J. Frankfurter, Jackson and Murphy).

The physical film is a strip of celluloid of relatively negligible value, virtually worthless except for the image and sound track imprinted thereon. The copyrighted literary property, the potential reproduction of the picture and sound for public exhibition, is the only real value in the film. That literary property is of tremendous value, but only for public exhibition purposes. With each showing of the film the value of such literary property is partially consumed and destroyed by use. Each licensing of the film is, therefore, a disposition or sale of part of the literary property in the film. That such licensing of copyrighted literary property is in legal effect a sale of the literary property has been frequently recognized.

Twentieth Century-Fox Film Corp. v. Phillips (1948), 76 Ga. App. 825, 47 S. E. 2d 183;
Goldsmith v. Commissioner of Internal Revenue (1944), 143 F. 2d 466;
Herwig v. United States (1952), 105 F. Supp. 384.

Under various state and city sales tax laws substantial consumption of property by a licensee is deemed to be a sale, and the intrastate licensing of motion picture films is classified as a sales transaction and subjected to the state retail sales tax.

New York City, L. L. 44, 1949 Laws, § N 41-1.0.5;
United Artists Corporation v. Taylor (1937), 273 N. Y. 334, 7 N. E. 2d 254.

The sales tax laws of other states specifically exempt film licensing receipts and thus avoid the treatment of such licensing as taxable sales transactions.

Florida, 1949 Statutes, § 212.05(3);
Georgia, 1951 Laws, Act 240, § 92-2150.2(c);
North Carolina, 1950 General Statutes, Schedule E, § 105-167.8;
Oklahoma, 1951 Statutes, § 1251a (c) and (h);
Tennessee, 1932 Code, § 1248.52(c), § 1248.61.

In *Twentieth Century-Fox Film Corp. v. Phillips, supra,* film licensing receipts were held to be sales receipts includible in the sales ratio factor of the Georgia income tax allocation formula.

Under the New York City sales tax the interstate licensing of films by a New York City exchange to out-of-city exhibitors is treated as a sale consummated outside New York City and not subject to its tax. *United Artists Corporation v. Taylor, supra.*

The imposition of the Indiana gross receipts tax on unapportioned receipts from interstate sales transactions is an invalid burden on interstate commerce, for the particular reason that it imposes a potential multiple burden on such commerce. In so holding, in *J. D. Adams Mfg. Co. v. Storen, supra,* this Court said:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in

> which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." (304 U. S. 310.)

The crucial point is that film licensing receipts are the equivalent of sales receipts, may be taxed as such and may potentially be subjected to multiple state sales and gross receipts taxes when derived from interstate licensing. If respondent's Chicago exchange film licensing receipts from Indiana exhibitors may be taxed by Indiana, such receipts may also be taxed by Illinois where the exchange is operated and by New York where respondent is incorporated and the license agreements are entered into.

The imposition of such tax on the unapportioned receipts from interstate sales has further been held to be a direct burden on commerce and *per se* invalid. *Freeman v. Hewit, supra,* in which this Court said:

> ". . . What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce, ...(329 U. S. 256-7.)
>
> ". . . The tax on the sale itself cannot be differentiated from a direct unapportioned tax on gross receipts which has been definitely held beyond the State taxing power ever since Fargo v. State of Michigan, 121 U. S. 230 . . . ." (329 U. S. 257.)

After citing numerous illustrations of permissible taxes bearing on interstate commerce, such as manufacturers' excise taxes, corporate franchise taxes, net income taxes and property taxes, the Court, in *Freeman v. Hewit,* differentiated those taxes permitted to the states from a direct and invalid tax on gross receipts from interstate commerce, in these words:

> "These illustrative instances show that a seller State has various means of obtaining legitimate contribution to the costs of its government, without imposing a direct tax on interstate sales. While these permitted taxes may in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause." (329 U. S. 256.)

The imposition of a sales tax by the buyer's state on interstate sales transactions carried on in the same manner in which respondent carries on the business of the interstate licensing of film has been held an invalid burden on commerce. *McLeod v. J. E. Dilworth Co., supra.*

The sale of literary property in interstate commerce is, we submit, entitled to the same immunity from burdensome state sales and gross receipts taxes as were the sales of goods and securities held exempt from such taxes under the foregoing decisions of this Court. That is the effect of the decision of the Indiana Supreme Court.

The Question Presented Is Not Now of General Importance, Except to Respondent and Other Film Distributors

The question presented has been deemed adjudicated at least since the action of this Court in 1936 in denying review of the decision of the Washington Supreme Court in *Paramount Pictures Distributing Co. v. Henneford, supra.* Indiana is the only state, to respondent's knowledge, which attempts to impose a gross receipts or sales tax on the interstate licensing of motion picture film. The revenue of the states is adjusted to such assumed immunity from tax. The economy of the nation's film distributors is based on such assumed tax immunity, and a serious and inequi-

table financial burden would be placed on the film distributors if the door were now opened to the imposition of state gross receipts and sales taxes on the interstate licensing of film. Reconsideration of the question at issue, for years accepted as settled, would not be in the public interest and could lead to most disruptive and refractory results.

Petitioner's Authorities Inapplicable

Petitioner relies on decisions which are clearly distinguishable and without even persuasive effect.

The Court's decision in *Independent Warehouses, Inc. v. Scheele* (1947), 331 U. S. 70 (Petition, p. 9), upheld the validity of a New Jersey municipal warehouse license tax imposed on a public warehouse engaged in the storage of coal (for as long as two years) within the state after shipment from an out-of-state origin and prior to reshipment to an out-of-state destination. This decision is here relevant only to the right of a state to impose a tax on the receipts from the local activity engaged in by theater operators in the exhibition of films, a tax which Indiana imposes on Indiana exhibitors and which is not in contest.

United Artists Corporation v. Board of Censors (1949), 189 Tenn. 397, 225 S. W. 2d 550, Certiorari denied 339 U. S. 952 (Petition, p. 10), and *Fox Film Corporation v. Trumbull* (1925), 7 F. 2d 715 (Petition, p. 10), are both obsolete decisions relative to state censorship of films and are not relevant to the instant tax controversy. Compare: *Joseph Burstyn, Inc. v. Wilson* (1952), 343 U. S. 495.

In *Stone v. Stapling Machines Co.* (1954), 71 So. 2d 205 (Petition, p. 11), the Mississippi Supreme Court upheld the imposition of the Mississippi "sales tax" against a nonresident patent owner on rentals from the use in Missis-

sippi of patented box-making machines permanently located in Mississippi on the ground that such machines had acquired a business situs in Mississippi; but royalties paid by the same Mississippi licensee to the same out-of-state licensor for the use of the intangible patented invention in manufacturing boxes were not subjected to such tax. Indiana does not restrict its gross receipts tax to rentals from tangible property having a permanent or business situs in Indiana, but in the instant case has attempted to impose such tax on the unapportioned gross receipts from the interstate licensing of motion picture films delivered out-of-state to an Indiana exhibitor for a brief exhibition in Indiana and prompt return out-of-state for further interstate distribution, and to impose such tax on the receipts from the interstate sale of copyrighted intangible literary property having a situs outside of Indiana.

The decision in *Warner Bros. Pictures, Inc. v. District of Columbia* (1948), 168 F. 2d 157 (Petition, p. 14), involved only the application of the District of Columbia net income tax to the share of respondent's parent company in the film licensing receipts received by respondent's Washington exchange from the licensing of motion pictures to District of Columbia exhibitors; did not involve a gross receipts tax; did not involve the imposition of any tax on film licensing receipts received by the Washington exchange from exhibitors outside the District of Columbia; and did not involve any question of interstate commerce.

Department of Treasury v. Allied Mills, Inc. (1942), 220 Ind. 340, 42 N. E. 2d 34, affirmed *per curiam* 318 U. S. 74, involved the imposition of the Indiana tax on sales made to Indiana buyers by an Indiana corporation which had its principal office and manufacturing plant in Indiana and which accepted the orders from Indiana buyers at an out-

of-state branch from which it shipped the merchandise sold. Respondent is not an Indiana corporation and does not have its principal office or place of business in Indiana. No Indiana office has anything to do with the interstate film licensing business carried on by respondent's Chicago film exchange.

Disposition in Favor of Respondent is Necessitated on Other Grounds and the Result Now Effected Should Not be Reviewed

Review of the decision below, even if such decision were to be reversed, would not change the ultimate result in this case and is, therefore, needless and inappropriate. Determination on remand of the following questions raised in the court below, but not passed on by the state court, would again result in a decision in favor of respondent.

Nontaxability Required by International Harvester Co. Decision.

Respondent is entitled to the benefit of the decision of the Indiana Supreme Court in *Department of Treasury v. International Harvester Co.* (1943), 221 Ind. 416, 47 N. E. 2d 150, holding exempt from the Indiana tax the receipts from sales to Indiana buyers made by an out-of-state branch office of a foreign corporation legally admitted to do business in Indiana, having other branch offices in Indiana and carrying on an interstate sales business under the identical trade area sales distribution system employed by respondent in the licensing of motion pictures.

Because the sales orders were accepted outside of Indiana and the sales price was received outside of Indiana, the Indiana court held that the original tax act (Indiana Acts of 1933, Ch. 50, § 2) taxing nonresidents on "gross income

derived from sources within the State of Indiana," did not impose tax on such sales receipts. This exemption has been continued by petitioner under the present amended act (Indiana Acts of 1937, Ch. 117, § 1) taxing nonresidents on "gross income derived from activities or businesses or any other source within the State of Indiana." Equal protection of the laws, prescribed by the Fourteenth Amendment, requires that the similar film licensing receipts of respondent's Chicago film exchange be accorded similar exemption. *Wheeling Steel Corporation v. Glander* (1949), 337 U. S. 562. (Question raised below in paragraphs 10 and 11 of complaint, R. 14.)

Nontaxability Required Under Statutory Business Situs Exemption.

Respondent owns its own office building in Chicago where the Chicago exchange is managed by a branch manager, with sixty-eight employees, licensing, shipping and receiving film, billing for and collecting annual gross income approximating $2,000,000.00 deposited in two Chicago bank accounts. (R. 67-69, 156.)

The film licensing receipts received by such exchange from Indiana exhibitors constitute receipts "received from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana, or from activities incident thereto" and are "received from sources outside the State of Indiana" under the decision of the Indiana Supreme Court in *Department of Treasury v. International Harvester Co., supra,* and, therefore, are necessarily exempt from tax under the following proviso of Section 1(m) of the Indiana Gross Income Tax Act:

> ". . . Provided, further, That with respect to individuals resident in Indiana and corporations incor-

> porated under the laws of Indiana authorized to do and doing business in any other state and/or foreign country, the term 'gross income' shall not include gross receipts received from sources outside the State of Indiana in cases where such gross receipts are received from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana, or from activities incident thereto. . . ." (Indiana Acts of 1937, Ch. 117, § 1; Indiana Acts of 1953, Ch. 200, § 1);

and under petitioner's Regulation 4100, Rule 4, viz.:

> "Rule 4. Receipts from Businesses Maintained and Operated Wholly Outside the State. Persons resident and/or domiciled in Indiana who are engaged in business, the legal situs and location of which is in a state other than Indiana, and the activities of such business are carried on in states other than Indiana, will not be required to pay tax upon the gross receipts therefrom. For the purpose of this ruling the operation of a farm will be included under the term 'engaged in business.'" (Indiana Gross Income Tax Regulations 46, Series VII, Reg. 4100, Rule 4; Commerce Clearing House Indiana Tax Service P 10-103.)

Any such exemption accorded to Indiana corporations must, under the requirement of equal protection of the laws, be extended to respondent, a foreign corporation. *Wheeling Steel Corporation v. Glander, supra.* (Question raised below in paragraphs 10 and 12 of complaint, R. 14-15.)

Nontaxability Required Under Petitioner's Regulations

By official regulation, petitioner has accorded tax exemption to royalties received by nonresidents from the use in Indiana of other copyrighted literary property and from patents. Petitioner's official Regulation 3907 reads:

> "Royalties Received by Non-Residents. Persons resident or domiciled in states other than Indiana will be taxable upon gross income received by them as royalties from oil, mineral, and timber lands located in Indiana. (For rate of tax see Reg. 1820.) *This rule does not apply to royalties received from songs, books, stories or patents which have their situs at the domicile of the non-resident owner and hence are not subject to Indiana gross income tax.*" (Emphasis supplied.) (Indiana Gross Income Tax Regulations 46, Series VII, Reg. 3907; Commerce Clearing House Indiana Tax Service P 10-104f.)

Equal protection of the laws, prescribed by the Fourteenth Amendment, requires that respondent's similar film licensing receipts be accorded similar exemption. *Wheeling Steel Corporation v. Glander, supra.* (Question raised below in paragraph 10 of complaint, R. 14.)

Conclusion

For each and all of the foregoing reasons, the petition for certiorari herein should be denied.

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